No. 91-293

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

SOUTHERN PACIFIC TRANSPORTATION CO.,
Petitioner,
v.
JOSE HERNANDEZ,
Respondent.

On Petition for Writ of Certiorari to the Texas Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Association of American Railroads ("AAR") respectfully requests leave to file the attached brief *amicus curiae* in support of the Petition for Certiorari in this case. Petitioner has consented to the filing of the brief. Counsel for Respondent has not responded to several requests for consent.

AAR is a non-profit trade association representing the Nation's major railroads. Its members account for approximately 85 percent of the line haulage, employ 90 percent of the workers, and produce approximately 93 percent of the freight revenues of all railroads in the United States. AAR represents its member railroads before courts, agencies, and the Congress in matters of common concern. AAR files briefs as *amicus curiae* before administrative agencies and the courts in cases of interest to its members.

The issue presented by the petition concerns this Court's decision in *Norfolk & Western Ry. v. Liepelt*, 444 U.S. 490 (1980). In *Liepelt*, this Court established as a matter of federal common law that juries determining damages for personal injury actions under the Federal Employers' Liability Act (FELA) must be instructed that a plaintiff's damages award is not subject to income tax. The question presented in this case is whether a trial court's refusal so to instruct the jury in a FELA action is reversible error in all cases or only in those instances where the face of the verdict clearly shows that the jury improperly inflated the verdict to compensate for taxes it mistakenly believed would be assessed.

All members of the AAR are subject to FELA, and an AAR survey shows that in 1990 alone the railroad industry paid out close to one billion dollars in FELA claims.[1] Total gross operating revenues for the year were approximately $30 billion.[2] AAR members are confronted with defending thousands of FELA lawsuits each year, and are therefore vitally interested in practice and procedure under FELA.[3] Given the substantial amount of money paid out under FELA, the possibility of improperly inflated awards creates a significant financial burden on AAR members. If the Texas appellate court's decision is allowed to stand, AAR's members will have been deprived of the protection afforded them by *Liepelt*.

AAR seeks to file this brief to emphasize the importance of this case to the railroad industry and to support Petitioner's position that the refusal of a court to properly instruct the jury pursuant to *Liepelt* cannot be con-

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[1] AAR 1990 Report of Claims and Litigation Experience at 2-9, 2-10. Railroads paid out $877,431,702 in claims. When the cost of administering and defending claims is considered, the total cost exceeds one billion dollars.

[2] *Id.*

[3] In 1989 nearly 6,000 FELA suits were filed, and in 1990 nearly 8,000. *Id.* at 2-9.

sidered harmless error. Given the widespread conflict among the state and federal courts concerning this issue —including state courts of last resort and federal courts of appeals—*amicus* seeks the opportunity to urge this Court to review the decision below.

For the foregoing reasons, the Association of American Railroads respectfully requests that leave to file the attached brief *amicus curiae* in support of the petition for certiorari be granted.

Respectfully submitted,

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QUESTIONS PRESENTED

I. Whether the Texas Court of Appeals, in conflict with the United States Court of Appeals for the Fifth Circuit as well as the courts of several States, erroneously concluded that a trial court's refusal to instruct the jury, in conformity with *Norfolk & Western Ry. v. Liepelt*, 444 U.S. 490 (1980), that a damages award would not be subject to income tax, required reversal only when the resulting jury verdict exceeded the highest amount of damages supported by the plaintiff's evidence at trial.

II. Whether the Texas Court of Appeals, in conflict with the courts of other States, erroneously concluded that state and not federal law should govern the issue of when, if ever, a jury verdict can be affirmed notwithstanding a trial court's failure to give a *Liepelt* instruction.

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BRIEF AMICUS CURIAE OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The interest of *amicus* is set forth in the accompanying Motion for Leave to File Brief *Amicus Curiae*.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Norfolk & Western Ry. v. Liepelt*, 444 U.S. 490 (1980), this Court ruled that in actions arising under federal law, a trial court must instruct a jury that damages awards are not subject to federal or state income tax. This case presents an important and recurring issue that, since *Liepelt* was decided, has divided the Nation's federal and state appellate courts: whether failure to instruct a jury as required by *Liepelt* is harmless error when the damages awarded fall within the range that had been requested by the plaintiff. *Amicus* urges this

Court to grant certiorari to establish a uniform national standard for appellate review of the continuing stream of cases in which trial courts have failed to give the *Liepelt* instruction.

This case arises under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* ("FELA"). Petitioner Southern Pacific Transportation Company ("Southern Pacific") was sued under FELA by one of its employees, Respondent Jose Hernandez, in Texas state court.[1] Mr. Herandez, a laborer, sought damages for injuries incurred in the course of his employment with Southern Pacific. He presented expert testimony as to the present value of his lost future earnings. After offsets for contributory negligence and other matters, Hernandez received a damages award of $422,295.47, an amount within the range of damages identified by Mr. Hernandez's expert. *See Southern Pacific Transportation Co. v. Hernandez*, 804 S.W.2d 557, 561 (Tex. Ct. App. 1991).

At trial, Southern Pacific made a timely request for the following jury instruction:

> Under the law, any award made to the Plaintiff in this case is not subject to federal or state income tax. Therefore, in computing the amount of damages which you may find the Plaintiff is entitled to recover for past or future lost earnings, Plaintiff is entitled to recover only the net, after-tax income.

This instruction was drawn verbatim from the pattern instructions of the Fifth Circuit District Judges Association, and conformed to the requirements this Court established in *Norfolk & Western Ry. v. Liepelt*, 444 U.S. at 496-98. *Liepelt*, a FELA case like the present one, squarely held that juries adjudicating damages under federal recovery statutes such as FELA must be instructed *not* to adjust damages awards upward to com-

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[1] FELA permits concurrent state and federal jurisdiction. 45 U.S.C. § 56.

pensate for presumed income tax liabilities.[2] The state trial court in this case, however, without explanation, refused Southern Pacific's requested *Liepelt* instruction, and gave no instruction about income tax.

On appeal, Southern Pacific raised its properly preserved challenge to the jury verdict on the basis of the trial court's refusal to give the requested *Liepelt* instruction. The Court of Appeals of Texas agreed that the trial court's refusal to give the instruction was error, 804 S.W.2d at 561, but, finding that the error was harmless, nonetheless affirmed the verdict.

In determining whether the trial court's error required reversal, the Court of Appeals noted a split in governing federal authority on whether the error was reversible: the Fifth Circuit requires reversal whether or not the damages award exceeded the requested damages, and the Eighth Circuit requires evidence of inflation of the award. *Compare O'Byrne v. St. Louis Southwestern Ry.*, 632 F.2d 1285 (5th Cir. 1980), *with Flanigan* v. *Burlington Northern Inc.*, 632 F.2d 880 (8th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981). To resolve the question, however, the Court of Appeals—in conflict with the approach taken by other States—looked not to federal law but to a provision of *Texas* law on harmless error. The court below specifically relied on Texas Rule of Appellate Procedure

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[2] In *Liepelt*, a wrongful death action brought in Illinois state court under FELA, the jury awarded $775,000 to the plaintiff. *Liepelt*, 444 U.S. 497. The damages estimate provided by the plaintiff's expert was $302,000. The Court noted the difference between the award and the plaintiff's evidence and speculated that it was possible that the jury, composed of tax-conscious citizens, assumed that the award would be subject to tax and therefore inflated the award to compensate for that possible tax. The Court held, however, that "[w]hether or not" its speculation as to what the jury assumed was accurate, "it was error to refuse the requested instruction." *Id.* at 497, 498. The Court accordingly reversed the decision, and remanded the case for a new trial with a proper instruction that the award in a FELA case would not be taxed.

81(b)(1), which provides that errors of law do not justify reversal of trial court judgments unless "the error complained of amounted to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause rendition of an improper verdict." 804 S.W.2d at 561.

Applying this state-law standard, the Court of Appeals concluded that the trial court's error did not cause an improper verdict for two related reasons. First, the verdict did not exceed the range of damages Respondent's expert had claimed was supportable on the evidence. Second, Respondent's expert testified that he had taken income tax liability into account when estimating damages. Under these circumstances, the court concluded, the standard of Tex. R. App. P. 81(b)(1) was not satisfied. The Texas Supreme Court denied review. *See* Appendix B to Petition for Certiorari at 14a.

REASONS FOR GRANTING THE WRIT

The Petition for Certiorari correctly identifies a conflict in the Federal Courts of Appeals as to whether, and under what circumstances, a reviewing court may affirm a jury verdict despite the trial court's failure to give a *Liepelt* instruction. In the wake of *Liepelt*, the Fifth Circuit held that a FELA damages award must be reversed because of failure to give a proper income tax instruction, irrespective of any evidence of inflation of the award. *See O'Byrne v. St. Louis Southwestern Ry.*, 632 F.2d at 1286. The Eighth Circuit, in contrast, requires evidence of inflation to justify a reversal. *See Flanigan v. Burlington Northern Inc.*, 632 F.2d at 889.

Without more, the conflict in circuit authority identified by Petitioner justifies plenary review. *See* Supreme Court Rule 10.1(A). The conflict identified by Petitioner is, however, symptomatic of a pervasive and continuing confusion in this Nation's appellate courts—*state* as well as federal—over the principles that should govern appel-

late review of trial court failure to give a *Liepelt* instruction. The court below is not the first state court to recognize that the "Federal Circuit Courts of Appeal are not in agreement on this issue," *see Anderson v. Burlington Northern, Inc.*, 709 P.2d 641, 646 (Mont. 1985), *cert. denied*, 476 U.S. 1174 (1986), or to struggle with the proper standards for reviewing *Liepelt* error. As *amicus* will show, the persistence of divergent results in *state* courts adjudicating FELA cases—and even between state and federal courts for the same jurisdiction—underscores the need for plenary review of the question presented here. The time has come for this Court to establish a uniform national standard for determining when, if ever, *Liepelt* error may be deemed harmless.

Because FELA actions may be brought in state as well as federal court, 45 U.S.C. § 56, state courts are frequently responsible for applying the federal law necessary to resolve those cases. The appellate courts of fourteen States have faced the question whether a trial court commits reversible error when it fails to comply with *Liepelt*. Of those fourteen, four have held that a trial court's refusal to give the *Liepelt* instruction constitutes reversible error, without reference to the amount of the award. Ten States have held that, although trial courts err in refusing to give the instruction, the error is harmless when the amount of an award does not suggest that the jury has inflated it to compensate the plaintiff for taxes, or, conversely, that the error requires reversal when it appears the jury has inflated the award.

For example, the Ohio Court of Appeals held in 1987 that a trial court's refusal to give the *Liepelt* instruction invariably mandates reversal, without regard to the size of the verdict. *Watson v. Norfolk & Western Ry.*, 507 N.E.2d 468 (Ohio Ct. App. 1987). The plaintiff argued on appeal that because defendant could not show that the jury inflated the verdict due to tax considerations, reversal was improper. The court noted, however, that

"[t]he Supreme Court [in *Liepelt*] did not require proof of an inflated award before reversing for failure to give the tax instruction." *Id.* at 471. Citing the Fifth Circuit's decision in *O'Byrne v. St. Louis Southwestern Ry.*, 632 F.2d 1285 (5th Cir. 1980), the Ohio court reversed the trial court and remanded for a new trial.

Three other state courts have reached similar results. *See Onion v. Chicago & Illinois Midland Ry.*, 547 N.E.2d 721, 723 (Ill. App. Ct. 4th Dist. 1989) (noting, without reference to amount of award, that "since the instant case is based on Federal law, the *Liepelt* instruction should have been given to the jury. The trial court's failure to do so was reversible error."); *Sheff v. Conoco, Inc.*, 311 S.E.2d 14 (N.C. Ct. App. 1984) (reversing decision without reference to amount of award when trial court refused instruction); *Yost v. Union R.R.*, 551 A.2d 317 (Pa. 1988) (finding reversible error without reference to amount of jury award when trial court refused to give *Liepelt* instruction), *appeal denied*, 562 A.2d 827 (1989).

Other States have held that a trial court's failure to give the *Liepelt* instruction is reversible error only if the damages award suggests prejudice. Relying frequently on *Flanigan v. Burlington Northern, Inc.*, 632 F.2d 880 (8th Cir. 1980), these state courts typically compare the amount of the jury award with the evidence presented at trial. If the award does not exceed the damages claimed by the plaintiff, those courts have concluded that the jury did not inflate the amount to compensate for presumed income tax liability. *See Marlow v. Atchison, Topeka & Santa Fe Ry.*, 671 P.2d 438 (Colo. Ct. App. 1983) (harmless error where defendant cannot show jury inflated award); *Caribe Tugboat Corp. v. Duffy*, 427 So. 2d 227 (Fla. Dist. Ct. App. 1983) (harmless error considering evidence presented and relative amount of award), *review denied*, 436 So. 2d 98 (1983), *cert. denied*, 464 U.S. 1041 (1984); *Marynik v. Burling-*

ton Northern, Inc., 317 N.W.2d 347 (Minn. 1982) (harmless error when disparity between jury award and evidence may be based on fact that damages for pain and suffering are recoverable); *Seaboard Systems R.R. Inc. v. Cantrell*, 520 So. 2d 479 (Miss. 1987) (when court could not say whether jury inflated award for tax reasons or not, error was reversible); *Bair v. St. Louis-San Francisco Ry.*, 647 S.W.2d 507 (Mo. 1983) (en banc) (harmless error although jury awarded amount in excess of plaintiff's projected income because pain and suffering were proper components of verdict and no other evidence suggested jury inflated award), *cert. denied*, 464 U.S. 830 (1983); *Anderson v. Burlington Northern, Inc.*, 709 P.2d 641 (Mont. 1985) (harmless error when jury awards the amount, or less than the amount, projected by economist); *Fritz v. Consolidated Rail Corp.*, 508 N.Y.S.2d 422, 501 N.E.2d 30 (1986) (reversible error where jury awarded sum in excess of what counsel asked for in summation); *Faulkenberry v. Kansas City Southern Ry.*, 661 P.2d 510 (Okla. 1983) (harmless error where no disparity between amount of award and evidence), *cert. denied*, 464 U.S. 850 (1983).[3]

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[3] The confusion shows no signs of abating. The fourteen decisions discussed above are not limited to the one or two years following the 1980 *Liepelt* decision. In the instant case, of course, the Texas appellate court first faced the issue in 1991. And, between 1982 and 1991, with the exception of 1990, at least one state appellate court per year has ruled on the reversible/harmless error issue. Nor is the case law evolving toward a consistent position.

It is likely that state appellate courts will continue to face this issue despite *Liepelt*'s mandate. Many States have rejected the *Liepelt* instruction in cases arising under state law. *E.g., Yukon Equipment, Inc. v. Gordon*, 660 P.2d 428, 434 (Alas. 1983), *overruled on other grounds, Williford v. L.J. Carr Invest., Inc.*, 783 P.2d 235 (Alas. 1989); *Young v. Environmental Air Products, Inc.*, 665 P.2d 88, 95 (Ariz. Ct. App. 1982) *affirmed as modified*, 665 P.2d 40; *W.M. Bashlin, Co. v. Smith*, 643 S.W.2d 526, 532 (Ark. 1982); *Henninger v. Southern Pacific Co.*, 59 Cal. Rptr. 76, 80 (Cal. Ct. App. 1967); *Gorham v. Farmington Motor Inn, Inc.*, 271 A.2d 94, 96-97 (Conn. 1970); *Good Samaritan Hosp. Assoc., Inc. v. Saylor*, 495

The divergence in approach is substantial even among the state courts that apply harmless error analysis. In some jurisdictions, the burden appears to be on the defendant to demonstrate prejudice from the failure to give instructions. *See, e.g., Marlow v. Atchison, Topeka & Santa Fe Ry. Co.*, 671 P.2d at 442-43 (harmless error where "defendant failed to point to any evidence that the jury inflated the award.") In others, the plaintiff appears to have the burden to show the absence of prejudice. *Seaboard Systems R.R., Inc. v. Cantrell*, 520 So.2d at 485 (reversible error when court could not say whether jury inflated award for tax reasons). Some state courts affirm awards when they do not exceed the evidence of lost earnings, *Anderson v. Burlington Northern, Inc.*, 709 P.2d at 646, while others affirm even awards that exceed the lost earnings component. *Marynik v. Burlington Northern, Inc.*, 317 N.W.2d at 351.

Moreover, state courts appear confused as to whether state or federal law should govern the treatment of *Liepelt* error on appeal. A proper understanding of the

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So.2d 782 (Fla. Ct. App. 1986); *Newlin v. Foresman*, 432 N.E.2d 319, 325-326 (Ill. Ct. App. 1982); *Highshew v. Kushto*, 134 N.E.2d 555, 556 (Ind. 1956), *pet. denied*, 135 N.E.2d 215; *Stover v. Lakeland Square Owners Assoc.*, 434 N.W.2d 866, 871 (Iowa 1989); *Paducah Area Public Library v. Terry*, 655 S.W.2d 1923 (Ky. Ct. App. 1983); *Tennis v. General Motors Corp.*, 625 S.W.2d 218, 227 (Mo. Ct. App. 1981); *Maricle v. Spiegel*, 329 N.W.2d 80, 86 (Neb. 1983); *Scallon v. Hooper*, 293 S.E.2d 843, 845 (N.C. Ct. App. 1982); *review denied*, 295 S.E.2d 480; *Terveer v. Baschnagel*, 445 N.E.2d 264, 268-69 (Ohio Ct. App. 1982); *Green v. Denney*, 742 P.2d 639, 643 (Or. Ct. App. 1987), *review denied*, 749 P.2d 136; *Rivera v. Philadelphia Theological Seminary*, 507 A.2d 1, 22 (Pa. 1986); *Dehn v. Prouty*, 321 N.W.2d 534, 538-39 (S.D. 1982); *Barnette v. Doyle*, 622 P.2d 1349, 1367 (Wyo. 1981). *But cf., Psychiatric Institute of Washington v. Allen*, 509 A.2d 619 (D.C. Ct. App. 1986). It appears that this state court hostility to the *Liepelt* rule in state law actions has resulted in a frequent and continuing failure of state courts to give the *Liepelt* instruction in cases arising under FELA—as well as some disposition in state appellate courts to find error harmless on indefensible grounds.

relation between federal and state law suggests that *federal* law governs this question because it vitally affects substantial federally-created statutory rights. *See* Hill, Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?, 17 OHIO ST. L. J. 384 (1956). Some state courts properly appear to have treated the effect of *Liepelt* error as a federal question. *See, e.g., Watson v. Norfolk & Western Ry.*, 507 N.E.2d at 471; *Faulkenberry v. Kansas City Southern Ry.*, 661 P.2d at 512. Other state courts, including the court below, appear to have treated the issue as one of *state* law. In this case, for example, the Texas Court of Appeals applied the reversible error standard of Texas R. App. P. 81(b)(1), and did not conduct any independent analysis as to whether *federal* law permitted harmless error analysis. 804 S.W.2d at 561. *See also Yost v. Union R.R.*, 551 A.2d 317 (applying Pennsylvania law).

This lack of uniformity is fundamentally at odds with the general principle that federal law should have the same meaning in every jurisdiction. *See* R. Stern, E. Gressman & S. Shapiro, SUPREME COURT PRACTICE § 4.4, 197 (6th ed. 1986). As this Court held in *South Buffalo Ry. v. Ahern*, 344 U.S. 367, 371 (1953), FELA was intended to ensure a uniform application of law to the nation's railroads. The present nationwide confusion over the consequences of *Liepelt* error vitiates that federal policy, as well as the general goal of uniform application of federal law, and provides a substantial reason for granting the petition for certiorari.

Indeed, AAR's member railroads are presently subject to differing standards of law depending on not only the State in which a case is brought, but also whether a case is brought in state or federal court. Had the present case been filed in *federal* court in Texas, for example, the court would have been bound by *O'Byrne v. St. Louis Southwestern Ry.*, 632 F.2d 1285 (5th Cir. 1980), which requires reversal for *Liepelt* error without any showing that the verdict was inflated. The risk of forum shopping

in the present confused situation is a substantial additional reason for plenary review.[4]

Review is also warranted because the ill-defined harmless error rule applied below threatens the "strong federal policies of fairness and efficiency in litigation of federal claims" advanced by the *Liepelt* instruction. *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 487 (1981). Requiring proof that a damages award exceeded the damages supported by plaintiff's evidence can hardly be called a rule of harmless error. In a typical case, the plaintiff's evidence will support a *range* of damages awards. The range will depend on what the evidence shows as to the extent of disability, the plaintiff's future earnings power, the proper discount rate for calculating present value, the proper level of compensation for pain and suffering, and a host of other variables. That a verdict ultimately falls below the upper boundary of verdicts supportable by the evidence provides very little guarantee against improper inflation of the kind *Liepelt* is meant to prevent. A jury might well conclude that the damages were near the low end of the range of supportable verdicts, inflate the award to compensate for presumed tax liability, and render a verdict that by happenstance remains below the upper limit of verdicts arguably supported by the plaintiff's evidence. In such a case, the defendant would be harmed;

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[4] The issue has even broader significance because the *Liepelt* rule applies not only in FELA actions but in many other cases arising under federal statutes authorizing recovery for injuries, including: the Jones Act, *Nesmith v. Texaco*, 491 F. Supp. 561, 563 (W.D. La. 1980), *modified in part per curiam on other grounds*, 727 F.2d 497 (5th Cir. 1984), *cert. denied*, 469 U.S. 855 (1984), actions brought pursuant to the Death on the High Seas Act, *Solomon v. Warren*, 540 F.2d 777, 788 n.12 (5th Cir. 1976), *cert. dismissed sub nom. Warren v. Serody*, 434 U.S. 801 (1977), and perhaps in actions brought pursuant to 42 U.S.C. § 1983 involving awards for loss of future earnings, *see* Note, "Income Taxation and the Calculation of Tort Damages Awards: The Ramifications of *Norfolk & Western Ry. v. Liepelt*," 38 WASH. & LEE L. REV. 289, 301 (1981).

yet, the court below—as well as those in ten other States and at least one federal circuit—would deem the error harmless.

The court below also made a fundamental error in assuming that harmless error could be premised on the fact that the plaintiff's expert testimony took income tax liability into account. By merely informing a jury that damages calculations account for income tax, an expert does not give a jury enough information to know it should not adjust its verdict to compensate for anticipated taxes. The jury receives sufficient information only if it is informed that the sum it awards will not be taxed. Indeed, if the jury believes that taxes will be levied against the verdict, expert testimony like that given in this case may well *increase* the likelihood of inflation of the award, because the jury might fear that without inflation the award would be taxed *twice*: once in the jury room, when only take-home pay would be awarded, and a second time by the Internal Revenue Service. Furthermore, the testimony of an expert cannot substitute for instruction from the trial judge as to the proper standard for measuring damages. *See Seaboard Systems R.R., Inc.*, 520 So.2d at 484.

At bottom, the harmless error analysis undertaken below, and endorsed by many state courts as well as the Eighth Circuit, is at odds with the ruling in *Liepelt*. In that case, the Court overturned the jury's verdict without any inquiry into whether the amount of the jury award exceeded the damages supported by the trial evidence. Although the Court speculated that the jury may well have increased its verdict to compensate for anticipated tax liabilities, the Court went on to make explicit its holding that reversal was required "whether or not" the jury had in fact compensated for anticipated taxes. Thus, *Liepelt* established a prophylactic rule, designed to protect defendants from the potentially serious financial effects of lay jurors' misconceptions about tax laws—*whether or*

not jury misconceptions can be shown to have affected a particular verdict. *Liepelt*, 444 U.S. at 496-98.

As this Court made clear in *Liepelt* and *Gulf Offshore*, instructing a jury that FELA awards are not subject to income tax is an important guarantee that this Nation's railroads will be protected against inappropriate and unfair jury inflation of damages awards in FELA cases. The strength of that guarantee now varies widely from State to State and Circuit to Circuit. Inconsistent appellate enforcement is, moreover, robbing the *Liepelt* rule of much of its protective force. That poses a particular threat to *amicus*'s member railroads. At present, FELA liability claims consume three percent of the annual operating revenues of these railroads—which amounts to almost a billion dollars per annum. *See* Motion For Leave To File Brief *Amicus Curiae*, at 2. *Liepelt* represented a salutary effort to inject a degree of fairness into a system that has seen an inexorable growth in liability,[5] and, by the simple expedient of a brief jury instruction, to eliminate one egregious sort of unjustifiable windfall to plaintiffs. Plenary review is needed to establish a uniform national standard and to restore the *Liepelt* rule as an effective protection against arbitrary, unfair and inefficient verdicts in FELA cases.

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[5] Since *Liepelt* was decided in 1980, annual FELA liability has increased by 156 percent, from $343 million to $877 million. AAR 1990 Report of Claims and Litigation Experience at 2-10; AAR 1989 Report of Claims and Litigation Experience at 2-8.

CONCLUSION

For all the foregoing reasons, as well as those set forth in the Petition for Certiorari, this Court should grant certiorari.

Respectfully submitted,

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